BRIEF FOR PETITIONER.

Opinions.

The District Court did not pass upon the merits of the case, but paved the way for a speedy appeal. A short statement for the record was made by District Judge Frederick H. Bryant on May 14, 1941. It appears on page 24. The opinion of the Circuit Court of Appeals (Judge Frank writing) was filed November 24, 1941. It appears in the record. It is reported in 123 Fed. 2nd, 862.

Jurisdiction.

Jurisdiction of the court is invoked under 28 U. S. C. A., Section 347 (Judicial Code, Section 240).

Facts.

The facts appear sufficiently stated in the petition, and neither repetition nor emphasis here seems necessary.

Argument.

Green, on account of his being a full-blooded Indian, a member of the Onondaga Nation of Indians, residing upon the lands of that Nation, and a member of the Iroquois Confederacy, is not subject to the provisions of the National Selective Service and Training Act of 1940.

Except for the Citizenship Act of 1924, Section 3, Title 8, U. S. Code (since repealed) and the Nationality Act of

1940, U. S. Code, Title 8, Section 601, purporting to confer citizenship upon Indians (as well as others), Green would not be a citizen (Elk vs. Wilkins, 112 U. S. 94), and never having declared his intention to become a citizen, he clearly would not be subject to draft. Selective Service and Training Act of 1940, U. S. Code, Title 50, Section 303, Subdivision a.

POINT I.

The above acts purporting to confer citizenship upon Green were enacted in violation of the United States Constitution.

The fundamental basis for citizenship is found in Amendment XIV, Section 1, first clause of the United States Constitution. It reads:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

In the instant case, the Circuit Court held that "whatever doubt there might possibly be concerning the 1924 statute, because of its title," (purporting to make Indians citizens), "the 1940 statute unequivocally made Green a citizen."

None of the Six Nations' Indians ever sought, asked for, or consented to their being made citizens (page 16). All of the Indians of the State of New York, in their organized capacity have opposed this legislation purporting to

make them citizens (page 16). Thus, no waiver of their rights in this respect can be asserted.

The record, as stipulated, shows that the Onondaga Nation through its chiefs has its own method of self-government, and that is its customary form of government which has prevailed before this country was settled by the whites (page 20); that the Six Nations has its own form of government which is in control of affairs common to the Six Nations, (page 20). Certainly, that Green owes allegiance to and is controlled to a large degree by his own Indian Nation as well as by the Six Nations government, there can be no question.

With the above in mind, can it be said that Congress had the constitutional power to make Green a citizen? In Elk vs. Wilkins, 112 U. S. 94 (1884), the court held that a certain western Indian who had separated from his tribe was not a citizen because he had been born on Indian tribal lands and thereby was not born "subject to the jurisdiction" of the United States as required under the 14th Amendment to the United States Constitution. The Supreme Court in this case even went further in respect to this question of jurisdiction and stated that this clause in the 14th Amendment meant "completely subject to the jurisdiction" of the United States. If this western Indian was not a citizen because not at birth completely subject to the jurisdiction of the United States, then how could Green be made a citizen by collective naturalization when not completely (if at all) subject to the jurisdiction of the United States? The placing of the commas in the first sentence of Section 1 of the 14th Amendment is significant. To be a citizen one must be born in and be subject to the

jurisdiction of the United States at the time of his birth, *or* he must be naturalized in the United States and at the time of his naturalization be subject to (completely subject to) the jurisdiction of the United States.

Our United States Constitution has referred to the Indians as a race separate and apart from our body politic. United States Constitution, Article 1, Section 2, Paragraph 3, 14th Amendment, Section 2 of the United States Constitution.

When the United States Constitution was adopted it contained no definition of citizenship. In 1868 by the adoption of the 14th Amendment for the first time citizenship was defined. Before the 14th Amendment, it was generally believed that United States Citizenship, except in cases of naturalization, was subordinated to and derived from State Citizenship. Burdick, "The Law of the American Constitution" (1922), p.p. 318, 322. It was also considered that a naturalized citizen of the United States, by residence in any state, was *ipso facto* a citizen of such state. Story, "Commentaries on the Constitution," Secs. 1693, 1694 (1851). The 14th Amendment resulted from Chief Justice Taney's opinion in the Dred Scott Case, 19 Howard 393 (1857). After the 14th Amendment United States Citizenship became paramount and dominant instead of subordinate and derivative. Selective Draft Cases, 245 U. S. 366, 389 (1918).

Two general ways have been recognized by the nations of the earth of acquiring citizenship, (1) by birth, (2) by naturalization. The former, also known as citizenship of origin, are regarded as native-born citizens. Citizenship by

birth has had its foundation either under the rule of "jus sanguinis" or under the rule of "jus soli," or combination of the two rules. Harvard Research, 23 Am. Jour. Int. Law Spec. Supp. 29 (1929). The principle of "jus soli," being of feudal origin, developed from the idea that territorial sovereignty tended to create a relationship between the person and the land to which he was attached. See Lynch vs. Clark, 1 Sanford's Chancery Reports, 583, 655 (1844). "Jus soli" is a part of the common law of England, and it is this principle which is set forth in the 14th Amendment. This amendment requires not only birth or naturalization in the United States, but also "subject to the jurisdiction." In Wong Kim Ark vs. United States, 169 U. S. 649, 693 (1898) it was stated that those persons not "subject to the jurisdiction" are (1) children of foreign sovereigns or ministers, (2) those born on foreign public ships in the territorial waters of the United States, (3) children born of enemies in hostile occupation, and (4) children of Indian tribes.

Before an attempt was made by Congress in 1924 to collectively naturalize the Indians, the United States Supreme Court in Elk vs. Wilkins, supra, held that an Indian born in Indian territory could not be a citizen within the constitution because he was not "born in the United States and subject to the jurisdiction thereof."

It is therefore respectfully submitted that Congress had no right to force citizenship upon an Indian owing allegiance to his own tribe and living upon his own Indian lands. The 14th Amendment is a constitution limitation against such.

Under principles of International Law your petitioner recognizes citizenship by treaty upon (1) annexation, (2) admission to statehood, (3) cession of territory, and perhaps (4) by conquest but no such conditions exist in the instant case. When such conditions do exist, always there will be found either consent to citizenship, or "subject to jurisdiction."

To have naturalization, either individual or collective, the subjects must be "subject to the jurisdiction" of the United States. This constitutional limitation relative to citizenship by birth is likewise applicable to citizenship by naturalization.

The United States to a very limited degree recognizes the law of "jus sanguinis" citizenship, that is, citizenship determined by parentage. This is only applicable to persons born abroad of American parentage. If the question arises as to whether or not such citizenship is within the constitutional limits of the 14th Amendment on the ground that there is a lack of "subject to jurisdiction thereof," then the answer is that this is a citizenship created by naturalization, that is, Act of Congress, and that these citizens born abroad are considered "natural-born citizens." The first law providing for citizenship "jure sanguinis" expressly provided that children born abroad of citizens of the United States would be considered "natural-born citizens." Law of March 26, 1790, 1 Stat. L. 103 Chap. 3. While subsequent enactments omitted the word "natural-born", it seems quite plausible that the omission was unintentional.

POINT II.

Even though these so-called citizenship acts of 1924 and 1940 were valid enactments, yet they reserve to Green a right to be secure from the draft.

Both the 1924 (now repealed) and 1940 Acts (supra) state that the granting of citizenship to Indians shall not in any manner impair or otherwise affect the right of such person to tribal or other property. "Tribal" property and "other property" refers to the rights of Indians generally. In 8 U. S. C. A., Section 3, wherein there was conferred on Indians who served for the United States in the World War the right of citizenship upon formal application, the citizenship thereupon granted was stated not to impair or affect the "property rights, individual or tribal, of any such Indian, or of his interest in tribal or other Indian property." The protection of the rights of Indians upon citizenship, while appearing broader in respect to the Indian soliders, certainly was not intended to be narrower in the case of the other Indians. The question then is, what are these tribal and property rights that were preserved. Their rights as a distinct and at least quasi-sovereign people would exclude them from the operation of the Selective Service and Training Act of 1940, and so would their rights under their treaties with the United States exclude them from the operation of this Act. While said Act refers to "all citizens," yet the obligations of the Act would be correspondingly mitigated by the obligations of the particular citizen as imposed upon his "qualified" admission to citizenship. The admission of the Indians to citizenship appears to be a qualified admission.

As these treaties of 1784, 1789 and 1794 are referred to in the record and petition fully, as pertinent, their terms are not repeated here. It seems clear that these treaties would secure Green against the "draft," unless the terms of these treaties have been legally changed whether by statute or otherwise. In each of these treaties, not only was the independence and the sovereignty of these Indian tribes recognized and acknowledged by the United States, but they were guaranteed by the most solemn of all contractual obligations to be secured in the peaceful possession of their lands. They were assured never to be disturbed, and were assured peace and friendship. It is submitted that Green's peaceful possession of his home has been destroyed and he has been "disturbed" when drafted into the armed forces of the United States. In Mason vs Sams (D. C. Wash. 1925) 5 Fed. (2nd) 255, it was held that the second sentence of Section 3, Title 8, U. S. Code preserved fishing rights of certain Indians. Thus this right has been broadly construed by the judiciary. The United States Supreme Court has held that treaties with the Indians are to be construed as "that unlettered people" understood them, and that construction of treaties should favor the Indians. Mason et al vs. Sams, Superintendent of Indian School, etc., 5 Fed. 2nd 255, U. S. vs. Winans, 25 S. Ct. 662, 46 L. Ed. 1089, Seufert Bros. Co. vs. U. S. as trustee, etc., 249 U. S. 194-196, 39 S. Ct. 203, 63 L. Ed. 555, Cherokee Nation vs. U. S., 203 U. S. 76, 89, 94, 27 S. Ct. 29, 51 L. Ed. 96, and numerous cases. The Indians undoubtedly felt that in making these treaties, they were dealing as an independent people.

While in 1871 Congress decided against making further treaties with the Indians, yet Congress also stated that

"no obligation of any treaty lawfully made and ratified with any Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired." Section 71, Title 25, U. S. Code. It is a matter of common knowledge that our government is even to this day annually fulfilling certain stipulations of these early treaties. The apparent intent of the legislative as well as the executive branches of our government is that these treaties are in force and are to be honored. Any attempted piecemeal dissolution of such treaties hardly would be conceivable, except by an express declaration of the legislature specifically referring to these Indians by name.

In negotiating these treaties with the Six Nations, the United States recognized these Indian Nations as a party who was capable of entering into the solemn obligations of a treaty. In Cherokee Nation vs. The State of Georgia, 5 Peters 1, the Supreme Court said:

> "The Constitution by declaring treaties already made as well as those to be made to be the Supreme Law of the Land has adopted and sanctioned the previous treaties with the Indian Nations and consequently admit their rank among those powers who are capable of making treaties. The word 'treaty' and 'Nation' are words of our own language selected in our diplomatic proceedings and have a definite and well-understood meaning. We have applied them to the Indians as we have applied them to the other Nations of the earth. They are applied to all in the same sense."

It is therefore submitted the Selective Service Act would not be applicable to a citizen who as a citizen had a right

to be exempt from the draft, a right which was preserved to him upon his admission to citizenship.

POINT III.

The Selective Training and Service Act of 1940 on its face is not applicable to our New York State Indians, and was not intended to apply to them.

Section 303, Subdivision A, of this Act, as of the time of Green's induction, first states that every male citizen of the United States and every male alien who has declared his intention to become such a citizen, between ages of 21 and 36 shall be liable for training and service in the land or naval forces of the United States. Then the President is authorized to induct "in the manner provided in this Act" such men as in his judgment is required in the national interest, not exceeding 900,000, except in time of war.

Section 304 determines the "manner of selecting men for training and service." Sub-section (a) provides that it shall be made in an impartial manner, under such rules and regulations as the President may prescribe for the men so qualified. Sub-section (b) is the particular portion of the Act which appellant claims to demonstrate that the Act does not and never was intended to apply to the Six Nations' Indians. It reads in part as follows: "Quotas of men to be inducted for training and service under this Act shall be determined for each State, Territory, and the District of Columbia, and for subdivisions thereof, on the basis of the actual number of men in the several States,

Territories, and the District of Columbia, and the sub-divisions thereof, who are liable for such training and service but who are not deferred after classification, except that credits shall be given in fixing such quotas for residents of such sub-divisions who are in the land and naval forces of the United States on the date fixed for determining such quotas." It is clearly discovered that the President is given authority in this Section to induct men only from each State, Territory, and the District of Columbia, and for subdivisions thereof. It would seem very apparent that the Congress in enacting this section never intended that Indians of the organized tribes should be subject to compulsory military training. Certainly the lands occupied by the organized tribes of the State of New York and particularly the Onondaga Nation of Indians are not a "STATE." The remaining question to decide is whether they are a "Territory" within the meaning of the ACT. The definition of the word "Territory" has a well-understood meaning and clearly would not include the lands occupied by the Onondaga Nation of Indians. "Territories" are mere dependencies of the United States, exercising delegated powers. Syoms vs. Eichelberger, 144 N. E. 279, 281, 110 Ohio St. 224.

"Territories" are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which the counties bear to the respective states, and Congress may legislate for them as a state does for the municipal organizations. First National Bank of Brunswick vs. Yankton County, 101 U. S. 129, 133, 25 L. Ed. 1046. See also Corpus

Juris for the definition of the word "Territory" or "Territories."

In McCandless, Commissioner of Immigration vs. United States ex. rel Diabo, 25 F. 2nd 71, decided March 9, 1928, it was said: "The question involved is whether the immigration laws of the United States apply to members of the tribe of the Six Nations born in Canada. Enlightened possibly by the status and relations of our own native Indians with reference to our own nation, we note that the unbroken line of decision has been that they stand separate and apart from the native-born citizen, that they are wards of the nation, and that the General Acts of Congress do not apply to them, unless so worded as clearly to manifest an intention to include them in their operation." In support of this statement the Court cited United States vs. Rickert, 188 U. S. 432, 23 S. Ct. 478, 47 L. Ed. 532; Elk vs. Wilkins, 112 U. S. 94, 5 S. Ct. 41, 28 L. Ed. 643; Cherokee Nation vs. Georgia, 5 Pet. (30 U. S.) 17, 8 L. Ed. 25.

In Cherokee Intermarriage Cases, 203 U. S. 76 at page 94, the Court held it to be "the settled rule that as between the whites and the Indians, the laws are to be construed most favorably to the latter."

From what is stated in the preceding pages there would seem no apparent intention upon the part of Congress to repeal existing treaties with the Six Nations' Indians in its enactment of the Selective Service and Training Act.

Conclusion.

Petitioner respectfully prays that the United States Supreme Court issue a Writ of Certiorari herein.

Respectfully submitted,

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